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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**SAN JOSE DIVISION**

MAXIMILIAN KLEIN, et al., on behalf of  
themselves and all others similarly situated,

Plaintiffs,

v.

FACEBOOK, INC.,

Defendant.

Case No. 5:20-cv-08570-LHK

**DEFENDANT FACEBOOK, INC.'S  
NOTICE OF MOTION AND  
MOTION TO DISMISS THE  
CONSOLIDATED CONSUMER  
CLASS ACTION COMPLAINT AND  
CONSOLIDATED ADVERTISER  
CLASS ACTION COMPLAINT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT  
THEREOF**

Hearing Date: July 15, 2021

Time: 1:30 pm

Judge: Hon. Lucy H. Koh

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1                                    **NOTICE OF MOTION AND MOTION TO DISMISS**

2            PLEASE TAKE NOTICE THAT, on July 15, 2021 at 1:30 pm in Courtroom 8 of the U.S.  
3 District Court for the Northern District of California, San Jose Division, at 280 South 1st Street,  
4 San Jose, CA, this Motion To Dismiss filed by Defendant Facebook, Inc. will be heard. Pursuant  
5 to Fed. R. Civ. P. 12(b)(6), Facebook moves to dismiss the Consolidated Amended Complaints in  
6 the above-captioned action. Facebook's Motion to Dismiss is based on this Notice of Motion and  
7 the supporting Memorandum of Points and Authorities.

8                                    **STATEMENT OF REQUESTED RELIEF**

9            Facebook requests that the Court dismiss Plaintiffs' claims under Rule 12(b)(6).

10                                  **MEMORANDUM OF POINTS AND AUTHORITIES**

11                                    **INTRODUCTION**

12            Over the last two decades, Facebook has succeeded in a fiercely competitive environment.  
13 With a seemingly unlimited number of choices about how to spend their time or be entertained or  
14 where to advertise, people and businesses use Facebook's products every day, not because they  
15 have to, but because they find them valuable. Ignoring this reality, Plaintiffs offer a series of  
16 unfounded and untimely allegations that fail to plausibly allege an antitrust case.

17            Three individuals who chose to use Facebook's free products and services for over fifteen  
18 years (Users) now seek to have Facebook *pay them* for that use. They make this unprecedented  
19 claim despite acknowledging that they have received (and presumably continue to receive)  
20 substantial value from using Facebook. Users also advance an implausible rewrite of history:  
21 They contend that Facebook's alleged misrepresentations in its privacy policies, starting in 2007,  
22 were *the* reason that Myspace and/or Friendster failed as competitors, thus enabling Facebook to  
23 obtain an alleged monopoly in supposed markets for "social networks" and "social media." No  
24 antitrust claim has ever proceeded past a motion to dismiss under such a theory, even if timely  
25 brought, which these claims are assuredly not.

26            Users are joined by a small number of individuals and entities (Advertisers) who claim  
27 injury through their purchase of an unspecified amount of advertising despite acknowledging that  
28 Facebook offers higher quality ads at far lower rates than what others, including Google, charge.

1 As with Users, Advertisers' claims are tardy, do not allege cognizable antitrust injury, and fail to  
 2 plausibly allege anticompetitive conduct. Each complaint thus fails on multiple grounds.

3 **Plaintiffs' Section 2 claims are time-barred.** The "gravamen" of Users' complaint is  
 4 allegedly deceptive conduct that occurred well over a decade ago. The statute of limitations and  
 5 laches bar Users' claims here. Users' monopoly acquisition theory would require reconstructing  
 6 the market as it existed in 2007 and then require the factfinder to assess the significance of privacy  
 7 policies in the decisions Users made to sign up for Facebook instead of Myspace and Friendster at  
 8 that time. But, to state the obvious, the relevant privacy policies were disclosed and publicly-  
 9 available to Users when they signed up for those services and widely-reported thereafter. So there  
 10 is no credible argument for tolling. *Hexcel Corp. v. Ineos Polymers, Inc.*, 681 F.3d 1055, 1060  
 11 (9th Cir. 2012). That reality is fatal to Users' and Advertisers' monopoly maintenance theory as  
 12 well, which is tied to a "scheme" involving publicly-known conduct alleged to have ended in 2015.  
 13 These acts were not concealed, let alone fraudulently so. Judge Freeman recently dismissed  
 14 virtually identical claims against Facebook *with prejudice* for just this reason.

15 **Plaintiffs allege gerrymandered and legally implausible markets.** Advertisers contend  
 16 there is a so-called submarket for "social" advertising distinct from online (and presumably other  
 17 forms of) advertising. But this attempt to ignore the competitive landscape is foreclosed by Ninth  
 18 Circuit precedent, with Judge Freeman holding just last week that it is implausible to create narrow  
 19 advertising submarkets that ignore direct competition between Facebook and Google. Users'  
 20 alleged "social network" and "social media" markets are also legally deficient. In addition to being  
 21 inscrutable, they are not defined using cross-elasticity of demand, and there are no plausible  
 22 allegations that warrant excluding obvious economic substitutes that also connect people with one  
 23 another. User Class Action Complaint ("UC") ¶ 62. Users also allege no facts to support the  
 24 theory that Facebook has monopoly power, and, on the contrary, allege many facts—including the  
 25 presence in the market of scores of large competitors—making clear that it does not.

26 **Plaintiffs' theories of exclusionary conduct fail to state a claim.** Users seek to turn  
 27 alleged misrepresentations about Facebook's privacy policies into a theory of unlawful  
 28 monopolization, but that rewrite of history is implausible on its face. Users' claim would fail

1 anyway because they have not pled this theory, which sounds in fraud, with particularity, nor have  
 2 they alleged specific facts that would overcome the Ninth Circuit’s presumption that false  
 3 advertising has a de minimis effect on competition. Likewise, Plaintiffs’ claim that Facebook  
 4 unlawfully maintained a monopoly, through a so-called “copy, acquire, kill” strategy, fails because  
 5 none of the alleged conduct violates the antitrust laws: “Copying” rivals—especially to improve  
 6 one’s products—is not anticompetitive; none of the firms Facebook acquired could plausibly be  
 7 viewed as a unique competitive threat to Facebook; and Plaintiffs’ refusal to deal theory—which  
 8 Judge Freeman already rejected—is at odds with the Supreme Court’s *Trinko* decision and the  
 9 Ninth Circuit’s decision in *Qualcomm*.

10 **Plaintiffs’ theories of antitrust injury are barred as a matter of law.** Users claim that  
 11 Facebook should have *paid them* for their use of Facebook. Again, no antitrust case has ever  
 12 survived a motion to dismiss on such a fanciful theory, and it is directly foreclosed by case law.  
 13 Advertisers’ theory of injury fares no better. They seek to be “reimbursed” for what they concede  
 14 were low-cost, high quality ads compared to other online options. Unsurprisingly, they fail to  
 15 allege how the prices they—and not advertisers generally—did pay were “supracompetitive,” or  
 16 even how much they paid or what a competitive price would have been. And Advertisers do not  
 17 even attempt to link—as they must—the allegedly supracompetitive prices to any of the conduct  
 18 that they challenge. Similarly, Advertisers offer no plausible allegations as to how an agreement  
 19 between Facebook and Google in one alleged market had an anticompetitive effect in what they  
 20 claim is a separate, unrelated market. And, as Judge Freeman also recently recognized, all  
 21 Plaintiffs necessarily indulge in pure speculation when they claim that the smattering of firms  
 22 Facebook acquired or allegedly “kill[ed]” would have succeeded.

23 The antitrust laws protect competition; they do not punish success. And they certainly do  
 24 not rewrite history in so doing. Both complaints should be dismissed with prejudice.

## 25 **BACKGROUND<sup>1</sup>**

26 In a now-familiar story, Facebook was founded in 2004 by Mark Zuckerberg in his college  
 27 dorm room. UC ¶ 5; Advertiser Class Action Complaint (“AC”) ¶ 44. Plaintiffs allege that people  
 28

<sup>1</sup> For purposes of this Motion only, Facebook accepts non-conclusory factual allegations as true.

1 use Facebook to: “Socialize. Stay in touch. Be entertained. [And] kill time.” UC ¶ 62. There  
 2 have been and continue to be, of course, countless other apps and websites, and other forms of  
 3 communication and entertainment, that allow users to do the same. For example, users “flock” to  
 4 Snapchat to send one another texts, photos, and videos. *Id.* ¶ 196. Videos of varying length can  
 5 be shared on YouTube or TikTok. *Id.* ¶ 36. Hundreds of millions of people use services like  
 6 Twitter, LinkedIn, Pinterest, and Reddit. And everyone with a smartphone has an address book  
 7 with contacts, which are a “ready-made, proto-social network from which” all mobile apps,  
 8 including services like iMessage and Signal, can draw. AC ¶ 4.

9 Facebook is free for its users. UC ¶ 38; AC ¶ 93. Facebook’s revenues come substantially  
 10 from advertising. AC ¶ 67. Facebook competes against other forms of advertising, including  
 11 banner and internet search-based ads. *Id.* ¶ 413. Facebook ads can be targeted to people by  
 12 location, age, gender, interests, demographics, behavior, and connections. *Id.* ¶ 425. Facebook is  
 13 not the only source for targeted advertisements. As just one example, Google remains a much  
 14 larger online “advertising titan[ ],” *id.* ¶ 16, with “control over exchange-traded advertising  
 15 throughout the Internet,” *id.* ¶ 411. Plaintiffs allege that Facebook’s advertisements are typically  
 16 less expensive than Google ads. *Id.* ¶ 438.

#### 17 **A. Pre-2010 Competitive Environment**

18 When Facebook was founded, it faced intense competition from, among others, Myspace  
 19 and Friendster, UC ¶ 68, were marked by “lax” privacy policies that permitted anyone to join  
 20 anonymously, *id.* ¶¶ 44, 104. Facebook required users to sign up with their real identities, which  
 21 “became [its] distinguishing feature.” *Id.* ¶ 48. Among a myriad of technical, management, and  
 22 product problems that were well-known and public, Myspace and Friendster ultimately folded.<sup>2</sup>  
 23 Plaintiffs paint an alternate reality: They claim Myspace and Friendster failed because of alleged  
 24 misrepresentations in Facebook’s privacy policies from 2007 to 2009 “subsequently proven to be  
 25

26 <sup>2</sup> In July 2005, News Corp. acquired Myspace for \$580 million. News Corp. sold the majority of  
 27 its stake for \$35 million in June 2011. *See* Gringer Decl., Ex. 1. Copies of certain materials cited  
 28 in this brief are attached as Exhibits to the Declaration of David Z. Gringer filed concurrently  
 herewith (“Gringer Decl.”). On a motion to dismiss, courts may take judicial notice of matters of  
 public record that are not subject to reasonable dispute. *See Lee v. City of Los Angeles*, 250 F.3d  
 668, 689 (9th Cir. 2001).

untrue.” *Id.* ¶ 120. These statements were the subject of “public outcry” soon after they were made, *id.* ¶¶ 114, 121, and many were the subject of a 2012 consent decree with the FTC, *id.* ¶ 127. Each Plaintiff knew of the decree when it issued. *Id.* ¶ 154.

#### **B. Post-2010 Competitive Environment**

Plaintiffs allege Facebook competes for the “attention” of users, which in turn drives advertising revenue. UC ¶¶ 60, 203, 225. Plaintiffs claim that from “2012 through 2015,” Facebook engaged in a “scheme” to thwart competition. AC ¶ 8. This alleged “scheme” consisted of the following: Beginning in 2012, Facebook acquired Instagram, an app for the sharing of photos and videos. UC ¶ 15. In 2014, Facebook acquired WhatsApp, a messaging app. *Id.* According to Plaintiffs, neither Instagram nor WhatsApp had the user base “necessary to compete” with Facebook at the time, *id.* ¶ 99, and both (public) acquisitions were reviewed and cleared by the FTC. In 2014, Facebook revised its policy to limit access to certain user data available through APIs to third-party developers, AC ¶ 500, which it implemented by 2015, *id.* ¶¶ 214, 225. Facebook manages API access to “decisively police the integrity of its platforms,” in which “the public has a strong interest.” *Stackla, Inc. v. Facebook Inc.*, 2019 WL 4738288, at \*6 (N.D. Cal. Sept. 27, 2019). Facebook supposedly also allowed certain app developers access to other APIs at an undefined time, pursuant to agreements labeled as “Data Sharing” agreements. AC ¶ 217. Neither complaint alleges these agreements were exclusive. Finally, Facebook allegedly copied product features offered by certain competitors in 2011-12 and 2016 to improve its offerings to Users. UC ¶¶ 191, 198, 200. The principal “victim” of this alleged copying, Snapchat, is today the most popular “social app” among teenagers in the United States, with TikTok trailing closely behind. Gringer Decl., Ex. 2.<sup>3</sup>

Advertisers alone also allege that Facebook and Google’s September 2018 agreement (the “Google Network Bidding Agreement,” or “GNBA”)—which has nothing to do with advertising on Facebook—nevertheless enabled Facebook to maintain “supracompetitive prices for social

<sup>3</sup> On a motion to dismiss, the court may consider documents incorporated by reference in the complaint. *See, e.g., Evans Analytical Grp., Inc. v. Green Plant Farms, LLC*, 2013 WL 3963822, at \*1 n.1 (N.D. Cal. July 29, 2013).

advertising.”<sup>4</sup> AC ¶¶ 22, 400.

## ARGUMENT

### I. PLAINTIFFS’ SECTION 2 CLAIMS ARE TIME-BARRED

#### A. The Statute Of Limitations Bars All Plaintiffs’ Damages Claims

Private lawsuits seeking damages for alleged violations of Section 2 of the Sherman Act are subject to a four-year statute of limitations. 15 U.S.C. § 15(b). In the Ninth Circuit, the default rule is that claims brought under the Sherman Act accrue “at the time of the alleged anticompetitive conduct.” *Garrison v. Oracle Corp.*, 159 F. Supp. 3d 1044, 1065 (N.D. Cal. 2016) (citing *Samsung Elecs. Co. v. Panasonic Corp.*, 747 F.3d 1199, 1203-04 (9th Cir. 2014)). To be sure, some courts in this district have found that plaintiffs’ antitrust claims accrue at the time of injury, but these courts were merely “determining whether to apply a discovery rule of accrual” and “were not presented” with the separate question of “whether accrual began at the time of injury or the time of the alleged anticompetitive conduct.” *Id.* at 1066. Here, Plaintiffs do not seriously dispute that their claims accrued when the challenged conduct took place: from 2007 to 2015 at the latest. But even if the Court were to look at the time Plaintiffs were allegedly injured, the claims are still time-barred since all Plaintiffs allege injury before December 2016. Thus, “the running of the statute is apparent on the face of [both] complaint[s],” and Plaintiffs’ claims should be dismissed. *Von Saher v. Norton Simon Museum of Art at Pasadena*, 592 F.3d 954, 969 (9th Cir. 2010).

**Users:** The UC alleges that Facebook violated the antitrust laws through a “two-part anticompetitive scheme”: first, by “consistently and intentionally deceiv[ing] consumers about the data protections it provided to its users” and second, by “identify[ing] nascent competitors and then ‘acquir[ing], copy[ing], or kill[ing]’” them. UC ¶¶ 2-4. But Facebook’s acts that form both parts of the alleged scheme occurred more than four years before—often well before—Users filed their lawsuit. *See, e.g., id.* ¶¶ 101-40 (representations regarding privacy policies beginning in 2007); *id.* ¶¶ 169-203 (changes to Facebook’s Platform policy in 2015 and acquisitions in 2012

<sup>4</sup> Over twenty lawsuits have been filed against Google and Facebook (or Google alone) in recent months alleging that one or both companies monopolized or suppressed competition in advertising-technology related markets, including by entering into the GNBA. A petition to centralize these cases was filed recently before The Judicial Panel on Multidistrict Litigation.

1 and 2014). Under the default rule in the Ninth Circuit, these claims accrued in 2015 at the absolute  
 2 latest. *Garrison*, 159 F. Supp. 3d at 1065; *see also DXS, Inc. v. Siemens Med. Sys. Inc.*, 100 F.3d  
 3 462, 467 (6th Cir. 1990) (holding that statute of limitations analysis under Sherman Act is focused  
 4 on “the defendant’s overt acts, as opposed to the effects of the overt acts”).

5 To the extent the timing of Users’ alleged injury is relevant, Users purport to rely on  
 6 Facebook’s failure to pay them for their time spent using Facebook. *See, e.g.*, UC ¶ 272. But even  
 7 assuming without basis that this is an “injury,” it too occurred well before the limitations period,  
 8 *id.* ¶¶ 19, 23, 26 (named Users joined Facebook in 2006-2008). Users make a half-hearted effort  
 9 to allege their injury did not “crystallize” until more recently, *id.* ¶ 246—but they provide no  
 10 explanation of what this means or why it would impact accrual.

11 **Advertisers:** Advertisers allege that Facebook violated the antitrust laws through a  
 12 “scheme” executed from “2012 through 2015.” AC ¶ 8. By Advertisers’ own account, the alleged  
 13 scheme occurred more than four years before Advertisers filed their lawsuit and their claims  
 14 accrued well outside the limitations period. *See, e.g., Garrison*, 159 F. Supp. 3d at 1065.

15 Even under an injury rule, Advertisers’ claims are untimely. Advertisers were allegedly  
 16 injured when they paid “supracompetitive prices for social advertisements.” AC ¶ 1.<sup>5</sup> That  
 17 Advertisers continued to purchase advertisements into the limitations period does not change the  
 18 analysis. *Kaiser Found. v. Abbott Labs.*, 2009 WL 3877513, at \*7 (C.D. Cal. Oct. 8, 2009) (“[T]he  
 19 statute of limitation [for unilateral conduct] runs from the time of commission of the act,  
 20 notwithstanding that high prices may last indefinitely into the future.”). In unlawful  
 21 monopolization cases, “profits, sales, and other benefits accrued as the result of an initial wrongful  
 22 act . . . are uniformly viewed as ‘ripples’ caused by the initial injury, not as distinct injuries  
 23 themselves.” *Z Techs. Corp. v. Lubrizol Corp.*, 753 F.3d 594, 600 (6th Cir. 2014).

24  
 25  
 26 <sup>5</sup> All but two of the named Advertisers are alleged to have purchased advertisements on Facebook  
 27 before December 2016. *See* AC ¶¶ 24-25, 27, 29-32. While the other two Advertisers allege that  
 28 they began purchasing advertisements during the limitations period—*see id.* ¶¶ 26, 28—  
 Facebook’s records show that both Advertisers actually began purchasing advertisements before  
 December 2016. *See* Decl. of Kristin Armitage ¶¶ 4, 5. These purchase records are incorporated  
 by reference in the AC and so can be considered here. *See supra* n.3.

**B. Laches Bars All Plaintiffs' Claims For Injunctive Relief**

All Plaintiffs' requests for injunctive relief are barred by laches. The Sherman Act's limitations period serves as "a guideline for computation of the laches period" in suits for injunctive relief. *Int'l Tel. & Tel. Corp. v. Gen. Tel. & Elecs. Corp.*, 518 F.2d 913, 926 (9th Cir. 1975) ("*ITT*"). And in "applying laches," courts "look to the same legal rules that animate the four-year statute of limitations." *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014). Laches issues may be decided on a motion to dismiss when apparent on the face of the complaint. *Reveal Chat Holdco, LLC v. Facebook, Inc.*, 471 F. Supp. 3d 981, 990-92 (N.D. Cal. 2020) ("*Reveal Chat I*"). Laches bars relief where "a party has inexcusably delayed pursuing his claim and his adversary has been prejudiced as a result." *Oliver*, 751 F.3d at 1085 n.4. That is true here. Plaintiffs waited years to "initiat[e] [this] lawsuit" even though they "knew (or should have known) of the allegedly [unlawful] conduct" the moment it occurred. *Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 952 (9th Cir. 2001). For example, the Instagram and WhatsApp acquisitions were highly publicized, as were the decisions by competition agencies in the U.S. and elsewhere not to challenge the acquisitions. *See Midwestern Mach. Co. v. Nw. Airlines, Inc.*, 392 F.3d 265, 272 (8th Cir. 2004) ("Mergers occur in the public eye and at a reasonably certain date."); *Reveal Chat I*, 471 F. Supp. 3d at 991-92 (holding that similar allegations were subject to the doctrine of laches). And Facebook's 2012 settlement with the FTC regarding the privacy representations at issue was likewise public. UC ¶ 145.

Plaintiffs' unreasonable delay also prejudiced Facebook. "The bare fact of delay creates a rebuttable presumption of prejudice." *ITT*, 518 F.2d at 926. Plaintiffs make no plausible allegations to rebut this presumption. Nor could they. For example, Facebook invested in and grew Instagram, AC ¶ 289, and the product is now a key component of Facebook's business, *id.* ¶¶ 290-93, 296. The prejudice from a ruling more than a decade later that the acquisition is unlawful is obvious. Particularly because "[t]he potential for economic disruption is so great" from a belated suit of this nature, the Court should not permit Plaintiffs to "sleep through" Facebook's alleged "antitrust violations and then sue many years later." *ITT*, 518 F.2d at 927. At a minimum, Plaintiffs' request for the "fairly extraordinary remedy" of divestiture (*see, e.g.*, UC

¶¶ 273, 283, 297, 307) is “‘barred as a matter of law’” based on “plaintiffs’ delay in bringing their suit.” *Taleff v. Sw. Airlines Co.*, 828 F. Supp. 2d 1118, 1124-25 (N.D. Cal. 2011), *aff’d*, 554 F. App’x 598 (9th Cir. 2014).

### C. No Tolling Theory Applies

#### 1. Fraudulent Concealment Does Not Apply

Because Plaintiffs commenced their lawsuits in an untimely manner, their “claims are time barred unless the Sherman Act statute of limitations is properly tolled.” *Reveal Chat Holdco LLC v. Facebook, Inc.*, 2021 WL 1615349, at \*5 (N.D. Cal. Apr. 26, 2021) (“*Reveal Chat II*”). Aware of their protracted delay in bringing suit, Plaintiffs seek to invoke the doctrine of fraudulent concealment. *See* AC ¶¶ 488-526; UC ¶¶ 237-43. That effort fails. To plead fraudulent concealment, Plaintiffs must allege that (1) Facebook engaged in “affirmative acts to mislead them,” (2) Plaintiffs lacked “actual or constructive knowledge of the facts giving rise” to the claim, and (3) Plaintiffs acted diligently in trying to uncover the facts giving rise to the claim. *Hexcel*, 681 F.3d at 1060. Moreover, both “the circumstances of the concealment and the facts supporting [plaintiffs’] due diligence” must be pled with particularity in accordance with Fed. R. Civ. P. 9(b). *Conmar Corp. v. Mitsui & Co. (U.S.A.), Inc.*, 858 F.2d 499, 502 (9th Cir. 1988); *Reveal Chat II*, 2021 WL 1615349, at \*4 (fraudulent concealment allegations must allege “an account of the time, place, and specific content of the false representation as well as the identities of the parties to the misrepresentations” and “what is false or misleading about a statement, and why it is false”). Plaintiffs’ allegations do not (and cannot) meet these requirements.

#### a) Advertisers Do Not Plausibly Allege Fraudulent Concealment

Advertisers allege that Facebook fraudulently concealed its alleged misconduct by enforcing a code of silence, preventing disclosure to developers and the public, continuing to promote APIs knowing that they were slated for removal, misleading developers and the public about the reasons for the removal through pretextual explanations, and misleading regulators and the public about acquisitions. *See* AC ¶ 489. Advertisers allege that the “true, non-pretextual” reasons for Facebook’s alleged conduct did not come to light until internal documents were released to the public. *Id.* ¶ 490. There are no allegations that any of this misled any of the

advertisers, which is alone fatal to the theory. Also, Judge Freeman recently rejected a fraudulent concealment argument focused on the same conduct because the acts that form the basis of the Plaintiffs’ lawsuit were all public and Plaintiffs knew or should have known about them long before the documents were released. *Compare* Amended Class Action Complaint, *Reveal Chat Holdco LLC v. Facebook, Inc* (“*Reveal Chat II* Compl.”), No. 5:20-cv-00363-BLF, Dkt. 62, at ¶¶ 446-75 (Aug. 7, 2020), with AC ¶¶ 488-516. Specifically, in *Reveal Chat II*, Judge Freeman found that very similar allegations “failed to plead affirmative conduct on the part of Facebook with the requisite particularity that Rule 9(b) requires.” 2021 WL 1615349, at \*8. And, significantly, Judge Freeman held that the *Reveal Chat II* plaintiffs had “failed to plead their diligence in trying to uncover the facts giving rise to its claim with particularity,” *id.* at \*9, despite the fact that the *Reveal Chat II* plaintiffs had at least *attempted* to plead their diligence, *see Reveal Chat II* Compl. ¶ 476. Here, Advertisers include *no* allegations about diligence.

#### **b) Users Fail To Allege Fraudulent Concealment**

Users’ fraudulent concealment theories are also meritless. *First*, with respect to Users’ privacy-representations theory, *see* UC ¶¶ 237-40, nearly all “affirmative acts” Users rely on to allege fraudulent concealment, *see id.* ¶ 238, are generalized, market-facing statements about Facebook’s commitments to user privacy and internet security that are only alleged to be false by a conclusory allegation lumping the statements together, *id.* ¶ 239. This does not meet the particularity requirements of Rule 9(b). *In re Packaged Seafood Prods. Antitrust Litig.*, 2017 WL 35571, at \*16 (S.D. Cal. Jan. 3, 2017) (“generalized statements,” including alleged statements to the public, are “insufficient to allege fraudulent concealment with particularity”). And the statements relating to the Cambridge Analytica incident (*e.g.*, UC ¶ 238(o)) are irrelevant to any alleged concealment analysis, as these events occurred after—according to Users—Facebook had already secured its monopoly, *see, e.g., id.* ¶ 154. Accordingly, these statements could not have prevented Users from uncovering the facts relevant to their monopoly *acquisition* claim. Users’ fraudulent concealment theory with respect to the supposed “acquire, copy, or kill” strategy fails

1 for the same reason as Advertisers’ nearly identical allegations. *See supra* pp.9-10.<sup>6</sup>

2       **Second**, Users had—at the very least—constructive knowledge of the facts giving rise to  
 3 their claims. *Hexcel*, 681 F.3d at 1060 (“The plaintiff is deemed to have had constructive  
 4 knowledge if it had enough information to warrant an investigation which, if reasonably diligent,  
 5 would have led to the discovery of the fraud.”). So long as a plaintiff is aware of “any fact that  
 6 should excite his suspicion,” he is deemed to have “actual knowledge of his entire claim.”  
 7 *Conmar*, 858 F.2d at 502. Many of the facts upon which Users premise their claims were widely  
 8 reported—sometimes over a decade ago. *See Reveal Chat I*, 471 F. Supp. at 993-94 (finding  
 9 constructive knowledge when “the Wall Street Journal reported” on existence of challenged  
 10 agreements). For example, Users allege that Facebook’s “Beacon” product allowed Facebook to  
 11 use data “in unauthorized or intrusive ways” as early as 2007. *See* UC ¶¶ 119-21. However, a  
 12 document cited in the UC explains that a report publicized the privacy implications of the Beacon  
 13 product in December 2007—almost fifteen years ago. *See* Gringer Decl., Ex. 3. Further, most  
 14 statements Users rely on to establish fraudulent concealment and the purportedly false  
 15 representations that make up the alleged scheme were supposedly made before the FTC order.  
 16 *See, e.g.*, UC ¶¶ 238(a)-(d). But the FTC order was public; indeed, the UC alleges that Users  
 17 “relied on” it “in deciding to continue to give Facebook access to their personal data.” *Id.* ¶ 154.  
 18 Accordingly, as the UC alleges, any supposed misrepresentations were discussed at length in that  
 19 very same order and thus cannot support a fraudulent concealment claim. *See Garrison*, 159 F.  
 20 Supp. 3d at 1062, 1084 (alleged fraudulent acts before the relevant limitations period are irrelevant  
 21 to the fraudulent concealment analysis).

22       **Third**, the UC fails to allege diligence. Instead, it *disclaims* Users’ obligation to be diligent  
 23 because “nuances in privacy terms are relegated to investigative journalists to discover and  
 24 explain” and firms “*like* Facebook . . . often further obfuscate their data privacy practices.” UC  
 25 ¶¶ 234-35 (emphasis added). This allegation—which undermines Users’ central argument that  
 26 Facebook’s privacy policies were *the* reason for its success—cannot excuse a lack of diligence. A  
 27

28 <sup>6</sup> Where plaintiffs do not plead affirmative acts to mislead, “the Court need not address the remaining elements of the fraudulent concealment analysis.” *Ryan v. Microsoft*, 147 F. Supp. 3d 868, 885 (N.D. Cal. 2015).

1 plaintiff cannot “escape the requirement that she exercise reasonable diligence” by claiming that  
 2 “she could not understand” the “information necessary for her to make an informed decision.”  
 3 *Dodds v. Cigna Sec., Inc.*, 841 F. Supp. 89, 95 (W.D.N.Y. 1992). As Users themselves allege, *see*,  
 4 *e.g.*, UC ¶¶ 117-22, news stories about Facebook’s privacy policies, including by “investigative  
 5 journalists,” date back well over a decade. These allegations do not constitute sufficient diligence.  
 6 *See, e.g., Rutledge v. Boston Woven Hose & Rubber Co.*, 576 F.2d 248, 250 (9th Cir. 1978)  
 7 (diligence must be supported by facts alleged “with particularity”).

## 8 **2. Users Cannot Invoke The Continuing Violation Doctrine**<sup>7</sup>

9 “A continuing violation is one in which the plaintiff’s interests are repeatedly invaded.”  
 10 *Pace Indus., Inc. v. Three Phoenix Co.*, 813 F.2d 234, 237 (9th Cir. 1987). To invoke the doctrine,  
 11 a plaintiff must allege “an overt act during the limitations period that meets two criteria: 1) It must  
 12 be a new and independent act that is not merely a reaffirmation of a previous act; and 2) it must  
 13 inflict new and accumulating injury on the plaintiff.” *Reveal Chat I*, 471 F. Supp. 3d at 994.

14 As a matter of law, Users’ allegations that the “continued exposure of private  
 15 information . . . leading up to 2018” constitutes a continuing violation as to Facebook’s data  
 16 privacy practices, UC ¶ 245, are insufficient. The exposure of supposedly private information is  
 17 not an antitrust violation, and “[t]he continuing violation doctrine is inapplicable when, as here,  
 18 the actions falling within the period of limitations are not themselves violations.” *Duarte v.*  
 19 *Quality Loan Serv. Corp.*, 2018 WL 2121800, at \*8 (C.D. Cal. May 8, 2018). Users also allege  
 20 no specific facts that *their* information was “expos[ed],” nor do they allege facts that they suffered  
 21 any injury if it was; and therefore by definition they cannot show the new and accumulating injury  
 22 the law requires. *Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1143 (9th Cir. 2010) (exposure of  
 23 personal information constitutes injury-in-fact only where plaintiffs face “a credible threat of real  
 24 and immediate harm”). Finally, Users do not allege any new overt acts of exposure inside the  
 25 limitations period. This is independently fatal to this theory because “passive” conduct will not  
 26 “restart the statute of limitations.” *Eichman v. Fotomat*, 880 F.2d 149, 160 (9th Cir. 1989).

27 Likewise, the supposed “instances of deception” that occurred post-2010 do not support  
 28

<sup>7</sup> Advertisers do not allege a continuing violations theory.

1 Users’ monopoly acquisition claim. By that time, according to the UC, Facebook had obtained a  
 2 monopoly. *See, e.g.*, UC ¶¶ 124, 154. Users’ monopoly *maintenance* claim tied to the alleged  
 3 “copy, acquire, kill” scheme does not include this alleged deception. But even if it did, Users fail  
 4 to allege how this supposed deception inflicted a new and accumulating injury *to them*, especially  
 5 since they were aware of the alleged deception by 2012 but continued to use Facebook. *Id.* ¶ 154.

6 Users also incorrectly assert that “[e]ach” of Facebook’s actions “as a part of its serial  
 7 acquisition strategy to ‘acquire, copy, or kill’ its competitors . . . were separate and independent  
 8 overt acts during the limitations period” and amount to continuing violations. UC ¶¶ 244-45  
 9 (emphasis added). There are only two alleged acts that occurred after 2017<sup>8</sup>—the “cloning” of  
 10 Houseparty and the acquisition of tbh, *id.* ¶¶ 204-05, 207. Neither suffices. The continuing  
 11 violation doctrine does not apply to merger challenges and thus cannot save the claims tied to pre-  
 12 2017 acquisitions. *See Reveal Chat I*, 471 F. Supp. 3d at 994-95.<sup>9</sup> The supposed cloning is a  
 13 product improvement that benefitted the Users by adding functionality to the Facebook app. Users  
 14 unsurprisingly do not allege that either act inflicted a new and accumulating injury or any injury  
 15 at all. *See id.* at 995. And there certainly are not allegations to explain how the tbh acquisition  
 16 lessened competition.

## 17 **II. PLAINTIFFS FAIL TO PLAUSIBLY DEFINE A RELEVANT PRODUCT MARKET**

18 “A threshold step in any antitrust case is to accurately define the relevant market, which  
 19 refers to the area of effective competition.” *FTC v. Qualcomm Inc.*, 969 F.3d 974, 992 (9th Cir.  
 20 2020). The relevant market alleged must be supported by plausible factual allegations. *See Hicks*  
 21 *v. PGA Tour, Inc.*, 897 F.3d 1109, 1120-24 (9th Cir. 2018). A “complaint may be dismissed under

22 <sup>8</sup> Users also challenge the acquisition of Giphy. *See* UC ¶ 206. This acquisition was announced  
 23 in 2020 but has not yet been completed and so cannot have harmed Users.

24 <sup>9</sup> Facebook recognizes that this Court held that the continuing violation doctrine could be applied  
 25 to challenges to acquisitions brought under Section 2 of the Sherman Act, even though it does not  
 26 apply in the context of Section 7 of the Clayton Act. *See Free Hand Corp. v. Adobe Sys. Inc.*,  
 27 852 F. Supp. 2d 1171, 1187 (N.D. Cal. 2012). Of course, there, the acquiring firm shut down the  
 28 acquired firm—an independent anticompetitive act separate from the initial acquisition. Not so  
 here. On these facts, the *Reveal Chat I* court reached a different conclusion, noting that there “is  
 no reason to treat the same conduct differently in sister statutes that are designed to promote the  
 same legislative objective.” 471 F. Supp. 3d at 995. Other recent cases have agreed with the  
*Reveal Chat* court. *See, e.g., Z Techs. Corp.*, 753 F.3d at 603; *Complete Entm’t Res. LLC v. Live*  
*Nation Entm’t, Inc.*, 2016 WL 3457177, at \*1 (C.D. Cal. May 11, 2016).

Rule 12(b)(6)” when its allegations do not satisfy the “legal principles that govern the definition” of a product market. *Id.* at 1120. These principles include the requirement that the complaint plausibly excludes alternatives that consumers could substitute for the same purpose (“reasonable interchangeability”), and that it alleges sufficient facts to establish “cross-elasticity of demand,” or consumer switching in response to price increases. *See Oltz v. St. Peter’s Cmty. Hosp.*, 861 F.2d 1440, 1446 (9th Cir. 1988). An alleged market that is “not natural,” “artificial,” or “contorted to meet [plaintiffs’] litigation needs” compels dismissal. *Hicks*, 897 F.3d at 1120-23. Here, Plaintiffs allege inconsistent and implausible relevant markets. Advertisers allege a “social advertising” submarket. Users allege “social network” and “social media” markets. All Plaintiffs allege different markets than the government. None of these alleged markets is viable.

**A. Advertisers Fail To Plausibly Define A Product Market**

Advertisers “social” advertising “submarket” is an obvious and legally flawed attempt to find a monopoly where none exists. The AC acknowledges that Facebook participates in a vibrant competitive market for advertising dollars against “titan” Google among others. AC ¶ 16. In evaluating this same alleged market on a motion to dismiss, Judge Freeman stated that she had “real concerns” and told plaintiffs they had to “clearly define” the market in an amended complaint. *Reveal Chat I*, 471 F. Supp. 3d at 1000. They never did; nor do Advertisers here.

Courts, including those in the Ninth Circuit, are skeptical even at the pleading stage of proposed markets limited to a single form of advertising because advertisers can and do reach consumers through other forms of advertising, particularly when prices increase. In *Hicks*, for example, the Ninth Circuit specifically rejected an allegation that a specialized form of advertising was plausible because it was more effective at reaching interested customers and had distinct pricing, as Advertisers contend is true about “social advertising.” *See* 897 F.3d at 1121-23; AC ¶¶ 413, 436-38. Instead, *Hicks* held that advertising on social media was reasonably interchangeable with other forms of advertising. 897 F.3d at 1123. For this reason, the Ninth Circuit explained “many courts have rejected antitrust claims reliant on proposed advertising markets limited to a single form of advertising.” *Id.* Advertisers have alleged nothing to support a different result here.

Applying *Hicks*, Judge Freeman held just last week that an alleged market that sought to isolate Google and Facebook into different advertising markets could not survive a motion to dismiss. *In re Google Dig. Advertising Antitrust Litig.*, No. 5:20-cv-003556-BLF, Dkt. 143, at 5-6 (N.D. Cal. May 13, 2021). At least one other case has already so held. *Kinderstart.com, LLC v. Google, Inc.*, 2007 WL 831806, at \*6 (N.D. Cal. Mar. 16, 2007) (holding different forms of online advertising could not be separated into distinct markets). Here, just as in the *Google* cases, common sense dictates that advertisers can and do shift their spending to and among all sources where consumers spend their time. *Hicks*, 897 F.3d at 1121 (holding “common sense” required rejecting a facially unsustainable advertising submarket). And if Google and Facebook are in the same market—not to mention the countless other platforms for advertising—then Facebook necessarily cannot have an advertising monopoly.

Further, Advertisers do not include factual allegations sufficient to define the contours of the market—*i.e.*, who participates, and who does not—beyond merely asserting that Twitter and LinkedIn compete. AC ¶ 448-49. They acknowledge that advertisers “buy ads on sites across the web,” *id.* ¶ 344, but offer no plausible basis for excluding other forms of advertising, including those specifically mentioned in the AC like YouTube. The failure to define the “boundaries of the market” renders the allegations legally deficient. *Newcal Indus., Inc. v. Ikon Office Sol.*, 513 F.3d 1038, 1045 (9th Cir. 2008); *see also Hicks*, 897 F.3d at 1120 (“Including economic substitutes ensures that the relevant product market encompasses the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.”).

#### **B. Users Fail To Plausibly Define Product Markets**

Virtually ignoring the relentlessly competitive business that provides Facebook with substantially all of its revenues (advertising), Users define instead markets in which the products are free and available in unlimited quantities. The implausible markets that Users purport to define thus ignore the basic purpose of defining a market—namely, “to identify the market participants and competitive pressures that restrain an individual firm’s ability *to raise prices or restrict output.*” *United States v. Am. Express Co.*, 838 F.3d 179, 196 (2d Cir. 2016), *aff’d sub nom.*, *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018) (emphasis added). Moreover, the alleged markets

suffer from two basic pleading defects: they do not address reasonable interchangeability or cross-elasticity of demand.

### 1. Users’ “Social Network” Market Fails As A Matter Of Law

Users’ “social network” market definition is contrived and legally insufficient. Users contend that social networks “allow users to find, communicate, and interact with friends, family, personal acquaintances, and other people with whom the users have shared interests or connections.” UC ¶ 56. This function-based attempt to define the market departs from the purpose of defining a relevant market. *Am. Express*, 138 S. Ct. at 2285. Rather, it appears to be a description of one aspect of Facebook’s products; it fails to provide a plausible basis for identifying which firms provide products that consumers consider acceptable substitutes, and which do not. *See Hicks*, 897 F.3d at 1121 (properly alleged market “encompasses the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business”); *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1336 (11th Cir. 2010) (stating that, even at pleading stage, a plaintiff “still must present enough information in [its] complaint to plausibly suggest the contours of the relevant geographic and product markets”). For example, as Users allege, Facebook is used to “kill time” and to entertain. UC ¶ 62. The UC alleges no facts explaining why the countless gaming, news, messaging, and other apps that allow users to do just that are not reasonable substitutes for time spent on Facebook.

As a result, Facebook is left in the dark about who is in this alleged market and who is out. *See Packaging Sys., Inc. v. PRC-Desoto Int’l, Inc.*, 268 F. Supp. 3d 1071, 1084 (C.D. Cal. 2017) (granting motion to dismiss where alleged market definition left “unclear what products this might encompass,” because such “ambiguities make Plaintiff’s market definition unsustainable on its face”); *Bay Area Surgical Mgmt. LLC v. Aetna Life Ins. Co.*, 166 F. Supp. 3d 988, 997 (N.D. Cal. 2015) (“Although detailed factual findings at the pleading stage are not required, Plaintiff must provide enough facts [about the relevant market] to enable the opposing party to defend itself effectively.”). To be sure, the UC contains conclusory and implausible allegations that the market does not include Twitter, Snapchat, LinkedIn, and TikTok, because they do not share the *exact same* functionality as Facebook. UC ¶¶ 37, 60. Likewise, it appears that other apps that entertain

1 users and “kill time” are not in this market either, notwithstanding the allegations that this is how  
 2 Facebook is used. If the alleged market is focused on uses for Facebook, it cannot simply exclude  
 3 products that facilitate those same functions at the mere say-so of Users, particularly when doing  
 4 so is at odds with common sense. Users are required to allege the contours of the market that  
 5 encompasses all “appropriate economic substitutes.” *Pistacchio v. Apple Inc.*, 2021 WL 949422,  
 6 at \*2 (N.D. Cal. Mar. 11, 2021); *see also Hicks*, 897 F.3d at 1123 (affirming dismissal where  
 7 product markets failed to include “many reasonably interchangeable products”). Users must—but  
 8 did not—allege *facts* explaining why these many other websites and apps are not *also* reasonably  
 9 interchangeable with whatever products are in the alleged market.

10 Users also fail to make any factual allegations about “cross-elasticity of demand.” *See*  
 11 *NSS Labs, Inc. v. Symantec Corp.*, 2019 WL 3804679, at \*9 (N.D. Cal. Aug. 13, 2019) (dismissing  
 12 antitrust claims). Because Facebook is free and available in unlimited quantities, Users do not and  
 13 cannot allege any effect a price change would have on demand to establish the boundaries of the  
 14 market. Nor have Users alleged an alternative basis to evaluate cross-elasticity of demand. Absent  
 15 such allegations, Facebook and this Court are impermissibly left guessing how to determine  
 16 whether another service is capturing demand in response to changes in Facebook’s product. *See id.*

## 17 **2. Users’ “Social Media” Market Fails As A Matter Of Law**

18 According to Users, “social media” includes websites and apps “that allow users of a given  
 19 application to distribute various forms of media—such as text messages, photos, videos, and  
 20 music—to other users of the same application.” UC ¶ 72. In other words, “social media” must  
 21 include iMessage, YouTube, TikTok, Snapchat, and Spotify, among many others. *See, e.g., Hicks*,  
 22 897 F.3d at 1121 (courts should use “common sense” in evaluating market definition on motion to  
 23 dismiss).

24 Users articulate no plausible basis for limiting this market to apps that offer in-app  
 25 distribution (such as WhatsApp and iMessage) while excluding competitors that allow for the  
 26 distribution of media outside their own applications (such as SMS messaging). Likewise, email  
 27 can do everything Users define as “social media,” *i.e.*, distributing media, albeit across platforms.  
 28 But the notion that email is outside the alleged market because social media is less functional than

1 email makes no sense. Lesser functionality just means products are differentiated, not that they  
 2 are in a wholly different market. *See In re Super Premium Ice Cream*, 691 F. Supp. 1262, 1268  
 3 (N.D. Cal. 1988), *aff'd sub nom., Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc.*,  
 4 895 F.2d 1417 (9th Cir. 1990). Users likewise fail to allege any plausible basis for excluding  
 5 competitors that provide other forms of online entertainment since they, like Facebook, compete  
 6 for user attention. UC ¶ 74. And like the “social networks” market, Users also fail to define the  
 7 contours of the “social media” market by reference to cross-elasticity of demand. *See supra* p.17.

### 8 **C. Users Fail To Plausibly Allege Monopoly Power**

9 Monopoly power is the power to “profitably raise prices substantially above the  
 10 competitive level.” *FTC v. Qualcomm Inc.*, 411 F. Supp. 3d 658, 684 (N.D. Cal. 2019). Even  
 11 accepting the alleged relevant markets, Users have not plausibly alleged that Facebook has  
 12 monopoly power in either purported market, a necessary element of a Section 2 claim. *See, e.g.*,  
 13 *Pac. Express, Inc. v. United Airlines, Inc.*, 959 F.2d 814, 817 (9th Cir. 1992).

14 In both markets, Users claim without support that Facebook’s “share” exceeds 65%, UC  
 15 ¶ 78, but they make no allegations about what this number consists of. Merely reciting a  
 16 percentage without alleging to what it refers—let alone how it was or could be calculated—is  
 17 conclusory and is not creditable. And because “[p]laintiffs’ only market share allegation does not  
 18 establish [Facebook’s] market share in the actual market[] defined by the Complaint[s],” the UC  
 19 cannot support an inference of monopoly power based on market share. *Rheumatology*  
 20 *Diagnostics Lab., Inc. v. Aetna, Inc.*, 2013 WL 3242245, at \*14 (N.D. Cal. June 25, 2013); *Korea*  
 21 *Kumho Petrochemical v. Flexsys Am. LP*, 2008 WL 686834, at \*9 (N.D. Cal. Mar. 11, 2008)  
 22 (granting motion to dismiss because, “[a]lthough Plaintiff need not necessarily quantify  
 23 [defendant’s] market share with precision, Plaintiff must assert some *facts* in support of its  
 24 assertions of market power that suggest those assertions are plausible”).

25 With respect to the alleged social media market in particular, the absence of detail is telling  
 26 because it is simply implausible that Facebook has monopoly power in a market that includes large  
 27 rivals like Apple’s iMessage, Twitter, YouTube, Snapchat, and TikTok. UC ¶¶ 73-74, 80. Perhaps  
 28 for that reason, Users’ market share allegations appear to exclude those entities without

1 explanation. Apparently aware that their share-based allegations in the “social media” market are  
 2 insufficient, Users claim to offer “direct” evidence of monopoly power based on two presentations,  
 3 UC ¶ 77, both of which are nearly a decade old, and neither of which even comes close to serving  
 4 as direct evidence of anything. *See* Gringer Decl., Exs. 4, 5. These presentations, on their face,  
 5 do not track Users’ alleged market definition and therefore are irrelevant. And even if the markets  
 6 did align, nothing in either document shows what the market share contained therein purports to  
 7 measure—the very same problem that dooms Users’ share allegations. These “conclusory  
 8 allegations do not establish direct evidence of [monopoly] power” or anything else. *Sidibe v. Sutter*  
 9 *Health*, 4 F. Supp. 3d 1160, 1180 (N.D. Cal. 2013).

10 Users do not even try to buttress their inadequate share-based allegations in the social  
 11 network market. And while it is completely unclear who might be in or out of this market, the UC  
 12 alleges no facts to suggest Facebook has monopoly power in this market either. Likewise, naked  
 13 assertions about barriers to entry do not suffice. UC ¶¶ 83, 88, 93-94. Even assuming *arguendo*  
 14 that there were adequate allegations about barriers to entry, that says nothing about whether a  
 15 *single firm* who participates in that market has monopoly power.<sup>10</sup>

### 16 **III. PLAINTIFFS HAVE NOT ADEQUATELY ALLEGED EXCLUSIONARY CONDUCT**

#### 17 **A. Facebook Did Not Unlawfully Acquire A Monopoly**

18 While Advertisers allege only a monopoly maintenance theory, Users allege that Facebook  
 19 acquired monopoly power through deception about its privacy policies. Specifically, Users allege  
 20 that “Facebook lied about its data privacy practices,” UC ¶¶ 21, 25, 28, “in order to entice users to  
 21 join Facebook,” *id.* ¶ 106; that “Facebook’s representations to consumers regarding its data  
 22 policies were instrumental to Facebook gaining and maintaining market share at the expense of its  
 23 rivals,” *id.* ¶ 108; and that if Users “had known the truth about Facebook’s privacy practices” they  
 24 “would not have agreed to give Facebook [] as much personal data,” *id.* ¶¶ 21, 25, 28. Users thus  
 25 “allege a unified course of fraudulent conduct,” *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097,  
 26

27 <sup>10</sup> For the same reasons they fail to plausibly allege monopoly power, Users fail to plausibly allege  
 28 that Facebook had “a dangerous probability of achieving ‘monopoly power’” in either alleged  
 relevant market, and their attempted monopolization claims (Counts II & IV) accordingly fail on  
 this basis. *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1432-33 (9th Cir. 1995).

1 1103 (9th Cir. 2003), which forms the basis of Users’ antitrust claims, *see* Dkt. 16-1 at 3  
 2 (describing Facebook’s alleged deception as the “gravamen” of Users’ Complaint). Users’ claims  
 3 “‘sound in fraud,’ and the pleading of th[ose] claim[s] [] must satisfy . . . Rule 9(b).” *Vess*, 317  
 4 F.3d at 1103-04.

5 None of the conduct that supposedly forms the basis of the alleged deception is alleged  
 6 with sufficient particularity. Users allege that Facebook “promised users . . . that it would ‘not use  
 7 cookies to collect private information from any user,’” but then subsequently “allowed third parties  
 8 to track Facebook users across the internet using cookies.” UC ¶¶ 106, 137. And they claim that  
 9 “Facebook initially maintained that” its “Beacon” advertising program “only tracked and  
 10 maintained the activity of users that consented,” which was allegedly “untrue.” *Id.* ¶ 120. But  
 11 there are no allegations explaining who made “promise[s]” to Facebook’s users regarding cookies  
 12 or how that person did so, just as the UC provides no explanation as to the manner in which, or to  
 13 whom, Facebook “maintained” its supposedly untruthful description of the 2007 Beacon program.  
 14 Nor is there any allegation about when either of these “statements” were made or to which named  
 15 plaintiffs they were communicated, if any. Accordingly, none of these purported representations  
 16 satisfies Rule 9(b), which “requires the plaintiff to allege the particular circumstances surrounding  
 17 [the] representations at issue.” *Tabler v. Panera LLC*, 2020 WL 3544988, at \*6 (N.D. Cal. June  
 18 30, 2020).

19 The UC’s descriptions of other supposedly deceptive acts likewise lack the fundamental  
 20 elements required under Rule 9(b). With respect to much of the challenged conduct, Users fail to  
 21 identify *any* underlying representation to Users, fail to explain how the representation was false,  
 22 or both. *See Vess*, 317 F.3d at 1105-06. Users assert that “Facebook created information dossiers  
 23 on millions of users and nonusers alike,” but never identify any instance in which Facebook made  
 24 any representations to Users about “dossiers,” false or otherwise. UC ¶ 139. Similarly, the UC  
 25 alleges that in 2012 Facebook announced that “future privacy changes would require user approval  
 26 through voting.” *Id.* ¶ 130. But there are no facts alleged about how this policy change involved,  
 27 as Users claim, a “promise” or “commitment” that Facebook would retain it permanently, let alone  
 28 how Facebook’s publicly-announced recession of the policy is consistent with a “pattern of

1 deception.” *Id.* The UC also challenges Facebook’s failure to “disclose to its users” that it  
 2 allegedly “provid[ed] to third parties . . . user data marked ‘private.’” *Id.* ¶ 118. But Users offer  
 3 no allegations regarding how this impacted competition.

4 These pleading deficiencies are exacerbated by the legal rule that antitrust claims based on  
 5 alleged false advertising should “presumptively be ignored.”<sup>11</sup> *Am. Prof. Testing Serv., Inc. v.*  
 6 *Harcourt Brace Jovanovich Legal & Prof. Publ., Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997). This  
 7 is because the likelihood of deceptive advertising leading to “significant creation of durable market  
 8 power is so small in most observed instances.” 3B Phillip E. Areeda & Herbert Hovenkamp,  
 9 *Antitrust Law* ¶ 782b at 351 (4th ed. 2015) (“Areeda”). The reasons for this rule are obvious: even  
 10 actually deceptive statements, particularly about one’s own product, are discoverable and do not  
 11 obviously impede rivals from competing. *Id.* Thus, to overcome this presumption, a plaintiff must  
 12 plausibly and particularly allege that the alleged misrepresentations were, *inter alia*: “clearly  
 13 material, clearly likely to induce reasonable reliance, . . . and not readily susceptible of  
 14 neutralization or other offset by rivals.” *Harcourt*, 108 F.3d at 1152. A failure to allege plausible  
 15 facts to meet each element of the test compels dismissal. *See, e.g., Tate v. Gas & Elec. Co.*, 230  
 16 F. Supp. 2d 1072, 1079-80 (N.D. Cal. 2002).

17 Here, the alleged misrepresentations are on their face reasonably susceptible to  
 18 neutralization by rivals in obvious ways. For example, those firms could have improved their own  
 19 policies, or called attention to Facebook’s supposed misstatements. *See Genus Lifesciences Inc.*  
 20 *v. Lannett Co.*, 378 F. Supp. 3d 823, 842 (N.D. Cal. 2019) (dismissing claims under *Harcourt*  
 21 because plaintiff failed to allege why it was incapable of “pushing back” on false statements);  
 22 *Kinderstart*, 2007 WL 831806, at \*8 (dismissing Section 2 claim because of insufficient  
 23 allegations that Google deprived competitors of ability to neutralize its statements, or that  
 24 competitors were unable to do so). The UC never alleges any factual obstacles to any of this.

25 Users also fail to allege with particularity that (or how) Facebook’s representations  
 26 impeded competition. The few “[c]ases that recognize deception as exclusionary hinge . . . on

27  
 28 <sup>11</sup> Facebook does not concede that these statements are “advertising,” but it is clear that Users so  
 allege because otherwise they could not begin to allege a causal link between the statements and  
 Facebook’s alleged monopoly power.

whether the conduct impaired rivals in a manner tending to bring about or protect a defendant’s monopoly power.” *Rambus Inc. v. FTC*, 522 F.3d 456, 464 (D.C. Cir. 2008). Representations about a company’s own product, like those at issue here, have “no particular tendency to exclude rivals and thus to diminish competition.” *Id.* Unsurprisingly, the UC does not allege any facts showing that Facebook’s alleged misrepresentations prevented other well-resourced firms—like Google or Snapchat—from competing effectively. And again, nothing stopped any firm from differentiating their own practices in response to the alleged misrepresentations.

These failings are unsurprising because the underlying theory is completely implausible. Users allege that Facebook’s representations about its privacy practices led to its success, and that users would have turned to alternatives if Facebook had made different representations about its privacy policies. *See, e.g.*, UC ¶ 3. Users’ theory is not cognizable if they fail to plausibly allege that deception was the but-for cause of Facebook’s supposed monopoly. *Rambus*, 522 F.3d at 464. Plaintiffs have not so alleged, nor could they. Instead, the UC offers competing theories for Facebook’s success, all more plausible than deception. These include Facebook’s “realness,” which is alleged to be Facebook’s “distinguishing feature,” and its unique emphasis on connecting friends, family, and other “verified relationships,” which the UC says “fostered an incredible amount of trust” among users. UC ¶ 48; *see Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 567 (2007) (antitrust claims are implausible where there was “an obvious alternative explanation” on the face of the complaint). Users’ allegations of deception are thus not enough to “nudge[] their claims across the line from conceivable to plausible,” compelling dismissal. *Id.* at 570.

#### **B. None of Plaintiffs’ Monopoly Maintenance Theories Are Cognizable**

All Plaintiffs advance a monopoly maintenance theory tied to the so-called “copy, acquire, kill, strategy.” Plaintiffs allege a “monopoly broth” theory, arguing that nearly every action alleged in the Complaints together amounts to a violation of Section 2. “Monopoly broth” does not allow a plaintiff to “alchemize” a “new form of antitrust liability” by combining distinct Section 2 claims that fail on their own. *Pac. Bell Tel. Co. v. linkLine Commc’ns, Inc.*, 555 U.S. 438, 457 (2009) (“Two wrong claims do not make one that is right.”). This requires an evaluation of each allegedly anticompetitive act on its own. And aggregating the competitive effects of a

series of actions, none of which is plausibly anticompetitive, “is of no assistance to [plaintiffs’] efforts to state a claim for relief” under Section 2. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 543-44 (9th Cir. 1983). No component of Plaintiffs’ alleged monopoly maintenance scheme is plausibly anticompetitive or otherwise cognizable.

### 1. Plaintiffs’ Product Improvement Allegations Are Non-Cognizable

Every firm, even an alleged monopolist, can lawfully improve its product offerings absent special circumstances not alleged here. *See, e.g., In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1143 (N.D. Cal. 2011). Here, Plaintiffs allege that Facebook introduced product features similar to those already offered by its competitors, *e.g.*, UC ¶¶ 200, 205; AC ¶ 14, and that this somehow amounted to exclusionary conduct. However, courts have consistently recognized that “a design change” (such as adding the “Stories” feature to Instagram) “that improves a product by providing a new benefit to consumers”—as demonstrated by its popularity relative to Snapchat’s offering, UC ¶ 200—is not cognizable by itself. *Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 998-1000 (9th Cir. 2010). Neither Complaint alleges any “associated anticompetitive conduct,” and so the “proposition that product improvement by itself does not violate Section 2, even if it is performed by a monopolist and harms competitors as a result,” holds. *Id.*

### 2. Facebook’s Acquisitions Were Not Exclusionary

Plaintiffs belatedly challenge Facebook’s acquisitions of three firms: Instagram, WhatsApp, and “tbh.” UC ¶¶ 186-94, 201-03, 207; AC ¶¶ 268-300, 301-23.<sup>12</sup> Aside from the conclusory allegation that “tbh”—an app about which Plaintiffs provide no information—was an “anonymous social media app,” UC ¶ 207, Plaintiffs do not allege that the acquired firms were competitors in any alleged market. Instead, Plaintiffs simply speculate that Instagram “*could*” become a competitor, UC ¶ 189; AC ¶ 279 (emphasis added), and Advertisers merely describe WhatsApp as having been a “nascent social platform,” AC ¶ 322.<sup>13</sup>

<sup>12</sup> Again, Users also challenge Facebook’s proposed acquisition of Giphy but fail to explain how this not-yet consummated deal has resulted in any competitive harms. *See supra* n.8.

<sup>13</sup> The UC does not allege that WhatsApp could have, or had any plans to, enter the relevant markets alleged in that Complaint. *See* UC ¶¶ 201-03.

1 No court has accepted the proposition advanced by Plaintiffs that acquisition of a firm that  
 2 *could* become a competitor is anticompetitive. *See Twombly*, 550 U.S. at 555 (requiring “[f]actual  
 3 allegations” that rise “above the speculative level”). “[T]o be condemned as exclusionary, a  
 4 monopolist’s act must have ‘anticompetitive effect.’” *Rambus*, 522 F.3d at 463. The mere  
 5 *potential* for competitive harm is not enough to violate Section 2. *See id.* The Supreme Court has  
 6 not endorsed anything like Plaintiffs’ theory, even under Section 7—the statute that expressly  
 7 addresses acquisitions and seeks to stop them in their incipiency. *See United States v. Marine*  
 8 *Bancorp.*, 418 U.S. 602, 625 (1974); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 75 (D.D.C.  
 9 2017) (“Whether actual potential competition is a viable theory of section 7 liability has not been  
 10 answered by the Supreme Court.”). This is because it is impossible to predict whether or how a  
 11 firm *not* competing in a particular alleged product market will enter that market, much less identify  
 12 future successes. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 71 (1st Cir. 2002).  
 13 Judge Freeman considered similar—and, in many cases, identical—allegations related to the  
 14 acquisitions of Instagram and WhatsApp and concluded that the allegations of potential harm to  
 15 competition were “merely conclusory.” 471 F. Supp. 3d at 1003 (“Plaintiffs provide no factual  
 16 support for their allegations that Instagram and WhatsApp were willing to, or could, harvest and  
 17 monetize social data to compete with Facebook.”). The same can be said of the other various  
 18 “would-be” competitors that Facebook either acquired or allegedly copied or killed. *Roy B. Taylor*  
 19 *Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir. 1994).

### 20 **3. Facebook Did Not Unlawfully “Kill” Third Party App Developers**

21 Plaintiffs allege that Facebook eliminated upstart competitors by denying third-party app  
 22 developers access to Facebook’s APIs and demanding concessions in contracts for user data shared  
 23 with consent. UC ¶ 167; AC ¶¶ 216-18. This component of Plaintiffs’ theory depends, first, on  
 24 the contention that Facebook had a duty to deal with third-party app developers, which by  
 25 Plaintiffs’ telling were Facebook’s competitors. No such duty exists. The theory also depends on  
 26 the implausible and entirely unsupported claim that a series of non-exclusive vertical contracts  
 27 somehow excluded competitors from the relevant markets.

**a) The API Policy Change Is Not Actionable**

Under the antitrust laws “there is no duty to aid competitors.” *MetroNet Servs. Corp. v. Qwest Corp.*, 383 F.3d 1124, 1131 (9th Cir. 2004) (quoting *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 411 (2004)). “As a general rule, businesses are free to choose the parties with whom they will deal, as well as the prices, terms, and conditions of that dealing.” *Linkline*, 555 U.S. at 448. “The one, limited exception to this general rule . . . comes under the Supreme Court’s decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985).” *Qualcomm*, 969 F.3d at 993. That exception exists “at or near the outer boundary of § 2 liability.” *Trinko*, 540 U.S. at 409. It requires a showing that a firm “(1) [] unilateral[ly] terminat[es] . . . a voluntary and profitable course of dealing; (2) the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition; and (3) the refusal to deal involves products that the defendant already sells in the existing market to other similarly situated customers.” *Qualcomm*, 969 F.3d at 993-94 (citing *MetroNet*, 383 F.3d at 1132-33). The Supreme Court has “warn[ed] . . . that the *Aspen Skiing* exception should be applied”—if at all—“only in rare circumstances,” *id.* at 994, and Judge Freeman stated just last week that she was “unlikely to entertain any allegations based solely on” *Aspen Skiing* given the few “existing exceptions from the proposition that there is no duty to aid competitors,” *In re Google*, Dkt. 143 at 8.

Whatever is left of the *Aspen Skiing* exception after *Trinko* and the Ninth Circuit’s recent decision in *Qualcomm*, it has no application here. **First**, in *Aspen Skiing* and the few other cases recognizing a duty to deal, the plaintiff and defendant cooperated to put forward a joint offering. 472 U.S. at 589-95. Here, there are no plausible allegations to that effect.

**Second**, Plaintiffs do not allege that developers provided Facebook with any value to access the APIs (to the contrary, access was provided for free), and thus changing the terms for access does not permit an inference that Facebook lost any profits. *Trinko*, 540 U.S. at 409. The “discontinuation of this arrangement” does not indicate, as it must, any “willingness to sacrifice short-term profits, let alone in a manner that was irrational but for its tendency to harm competition.” *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1076 (10th Cir. 2013) (Gorsuch, J.);

1 *hiQ Labs, Inc. v. LinkedIn Corp.*, 485 F. Supp. 3d 1137, 1142, 1151 (N.D. Cal. 2020) (dismissing  
 2 complaint because allegations that LinkedIn “denied access to the public portion of LinkedIn’s  
 3 website” to “people analytics providers” did not state a claim that “LinkedIn sacrificed a profitable  
 4 course of dealing in the short term”). Indeed, Advertisers’ allegations reflect an entirely rational  
 5 justification for Facebook’s conduct—the protection of user privacy and data security and the  
 6 prevention of free-riding. AC ¶¶ 502, 509; *see also SmileCare Dental Grp. v. Delta Dental Plan*  
 7 *of Cal., Inc.*, 88 F.3d 780, 786 (9th Cir. 1996) (dismissing complaint because the legitimacy of  
 8 policies to prevent free-riding “is a foregone conclusion requiring no further analysis”); *Stackla*,  
 9 2019 WL 4738288, at \*5-\*6 (“the public has a strong interest” in “allowing Facebook to exclude  
 10 those who act impermissibly on its platform and jeopardize user privacy”). A plaintiff cannot state  
 11 an antitrust claim by alleging conduct that is equally “consistent with” anticompetitive activity as  
 12 with a “rational and competitive business strategy.” *Twombly*, 550 U.S. at 554. To be sure,  
 13 Plaintiffs say this was not the actual basis for Facebook’s actions, but they fail to offer any factual  
 14 allegations supporting the conclusion—as the law requires—that Facebook’s stated rationale was  
 15 not even “conceivable.” *Qualcomm*, 969 F.3d at 993; *Port Dock & Stone Corp. v. Oldcastle Ne.,*  
 16 *Inc.*, 507 F.3d 117, 124-25 (2d Cir. 2007) (refusal to deal claim fails if “[t]he facts pleaded”  
 17 “sugges[t] . . . the purpose of increasing efficiency in some way”).

18 **Third**, Plaintiffs do not allege that Facebook continues to make the API data widely  
 19 available. The purpose of this requirement is to capture situations in which a firm deals with  
 20 “certain customers but merely refuses to sell to its competitors.” *MetroNet*, 383 F.3d at 1133.  
 21 There is no allegation that this data was ever made available at retail or to anyone other than “third-  
 22 party app developers”—Facebook’s purported competitors. UC ¶ 175; AC ¶ 126. The court in  
 23 *Reveal Chat I* already found that this prong of the *Aspen Skiing* rule is not satisfied by the API  
 24 withdrawal, 471 F. Supp. 3d at 1002, and Judge Freeman recently reiterated that a firm “has no  
 25 duty to help its competitors survive or expand” where, as here, it introduces a design change to a  
 26 competitor-facing product, *In re Google*, Dkt. 143 at 8-9.

27 **b) The Data-Sharing Agreements Were Not Exclusionary**

28 Plaintiffs’ allegations that Facebook’s data-sharing agreements with certain third-party

1 developers reduced competition are also implausible. UC ¶¶ 181-85; AC ¶¶ 216-33. As a matter  
 2 of law, vertical contracts like these agreements can only “injure competition” if they “foreclose  
 3 competitors from entering or competing in a market” or “facilitate[e] horizontal collusion.”  
 4 *Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1198 (9th Cir. 2012). Neither result could have  
 5 plausibly obtained from these agreements. Neither complaint alleges that the data-sharing  
 6 agreements prevented new competitors from organically collecting user data or collecting data  
 7 from independent sources not controlled by Facebook. Moreover, Plaintiffs do not allege the  
 8 agreements were exclusive and thus did not preclude signatories from acquiring data from both  
 9 Facebook and other sources, including their own websites or apps. And, as Judge Freeman  
 10 observed, this entire “scheme,” pursuant to which Facebook supposedly “only allowed its  
 11 successful competitors to stay on the platform” via data-sharing agreements “and cut out the  
 12 unsuccessful ones [,] . . . doesn’t make any sense.” *Reveal Chat* 12/3/2020 MTD Hr’g Tr. at 6.<sup>14</sup>

#### 13 IV. PLAINTIFFS LACK ANTITRUST STANDING

14 “Congress did not intend to provide a private remedy for all injuries that might conceivably  
 15 be traced to an antitrust violation.” *Amarel v. Connell*, 102 F.2d 1494, 1507 (9th Cir. 1996).  
 16 Instead, courts inquire into private plaintiffs’ “‘antitrust standing’” to determine whether they “are  
 17 the appropriate plaintiffs to enforce the antitrust laws.” *Feitelson v. Google Inc.*, 80 F. Supp. 3d  
 18 1019, 1026 (N.D. Cal. 2015). For a private plaintiff to establish antitrust standing, it is necessary  
 19 but not sufficient to plausibly allege antitrust injury, which includes the following elements: “(1)  
 20 unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the  
 21 conduct unlawful, [] (4) that is of the type the antitrust laws were intended to prevent.” *Somers v.*  
 22 *Apple, Inc.*, 729 F.3d 953, 963 (9th Cir. 2013). Courts also evaluate “the directness of the injury,”  
 23 “the speculative measure of the harm,” and “the complexity in apportioning damages” in assessing  
 24 whether a private plaintiff has antitrust standing. *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190  
 25 F.3d 1051, 1054 (9th Cir. 1999).

26  
 27 <sup>14</sup> All Plaintiffs’ failure to allege cognizable exclusionary conduct defeats both their  
 28 monopolization and attempted monopolization claims because the conduct requirement for both  
 types of claims is the same. *Rebel Oil*, 51 F.3d at 1432; *Olympia Equip. Leasing Co. v. Western*  
*Union Tel. Co.*, 797 F.2d 370, 373 (7th Cir. 1986) (Posner, J.); *Areeda* ¶ 806a.

1           **A.       Users Have Not Alleged An Antitrust Injury**

2                   **1.       Lost “Information And Attention” Is Not A Cognizable Injury**

3           The UC presents an entirely novel and unsupported theory of antitrust liability: that Users  
4 are entitled to money damages because they allegedly provided Facebook with more “personal  
5 information and attention” than they would have in a more competitive market. UC ¶ 222. To the  
6 extent this can be characterized as an “injury” at all, it is not one that confers antitrust standing or  
7 for which damages are available under the antitrust laws.

8           Only those plaintiffs injured in their “business or property” have suffered an antitrust  
9 injury. 15 U.S.C. § 15. “[B]usiness” refers to “that which occupies the time, attention, and labor  
10 of [a plaintiff] for the purpose of . . . pecuniary reward,” *Fine v. Barry & Enright Prods.*, 731 F.2d  
11 1394, 1397 (9th Cir. 1984) (emphasis added), and “‘property’ comprehends anything of material  
12 value owned or possessed,” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 338 (1979). Accordingly, the  
13 Sherman Act “allow[s] recovery only if a plaintiff can demonstrate a *financial* loss.” *Stationary*  
14 *Eng’rs Local 39 v. Philip Morris, Inc.*, 1998 WL 476265, at \*4, \*9 (N.D. Cal. Apr. 30, 1998)  
15 (emphasis added). Users have not done so, nor could they. Facebook provides all its user-facing  
16 services for free, and Users allege no facts suggesting that they had a “financial loss.”

17           Users do not really claim any injury at all. The quality-adjusted price of a free product is  
18 always zero, so Users could not have overpaid for using Facebook. And their speculative  
19 allegations that Facebook “artificially decrease[d] compensation to consumers for their  
20 information and attention,” e.g., UC ¶ 265, are simply another expression of Users’ complaint that  
21 the quality-adjusted price of zero was somehow too high. Users cannot even claim any injury tied  
22 to their own data being exposed. If there were any injury here, and there is not, it would be, at  
23 best, a “personal injur[y]” for which there is no antitrust remedy. *Reiter*, 442 U.S. at 339. Personal,  
24 as distinct from economic, injuries are simply not cognizable under the antitrust laws. *See, e.g.,*  
25 *Bhan v. NME Hosps., Inc.*, 669 F. Supp. 998, 1013 (E.D. Cal. 1987) (“lost . . . friends” and  
26 “marred” “reputation . . . are personal injuries that are simply not compensable under the antitrust  
27 laws”), *aff’d*, 929 F.2d 1404 (9th Cir. 1991).

28           Deviating from existing precedent and recognizing this kind of speculative injury as

cognizable under the Sherman Act would undermine several key purposes of the antitrust standing doctrine, particularly “(1) facilitating more effective enforcement of the antitrust laws; (2) avoiding complicated damages calculations; and (3) eliminating duplicative damages against antitrust defendants.” *Apple Inc v. Pepper*, 139 S. Ct. 1514, 1524 (2019). Apportioning damages between Users would be nearly impossible. The “compensation” of which the Users were deprived for their non-pecuniary resources cannot be assessed because everyone values those resources differently—if at all—and there is no way to calculate the baseline level of information and attention Users would have provided in a more competitive market. These “complicated theories” “involving massive evidence,” just to “ascertain damages,” counsel against finding antitrust standing. *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 543 (9th Cir. 1987).

## 2. Users’ Alleged Injury From Their Monopoly Acquisition Theory Is Speculative

“[C]onclusory and speculative” allegations that provide “no facts . . . that would render [the] threatened injuries more concrete than hypothetical” are insufficient to establish antitrust injury. *Feitelson*, 80 F. Supp. 3d at 1029.

The UC alleges that Facebook acquired its purported monopoly power through misrepresentations about its privacy practices to the detriment of its early competitors, like Myspace. UC ¶¶ 101-40. But the UC offers no allegations that these competitors would have remained viable but for the challenged conduct. *Atl. Richfield Co. v. USA Petrol. Co.*, 495 U.S. 328, 339 n.8 (1990) (“The antitrust injury requirement cannot be met by broad allegations of harm to the ‘market’ as an abstract entity.”). For instance, it contains no information about these firms’ business plans, economics, or strategies. And, critically, it alleges that these firms’ privacy policies were “lax” even in the face of competition from Facebook, leaving to guesswork whether, if any had succeeded, Users would have in fact received the higher “compensation” in the form of privacy protections they claim they would have received in a more competitive market. UC ¶ 95. There are also no allegations of plans for privacy improvements.

Users then leap to the conclusion that “fair competition” “would have required Facebook” to pay consumers “in return for consumers’ data.” UC ¶ 10. But there are no non-conclusory

1 allegations to support such counter-intuitive speculation. Certainly, no Facebook competitor is  
 2 alleged to have differentiated itself by engaging in the counter-intuitive strategy of paying users to  
 3 use their free product. *See Lucas Auto. Eng'g, Inc. v. Bridgestone/Firestone Inc.*, 140 F.3d 1228,  
 4 1233 (9th Cir. 1998) (no antitrust injury if plaintiff would have suffered “the same injury” absent  
 5 the challenged conduct). Given that Plaintiffs allege that Facebook had well over 40,000  
 6 competitors, AC ¶ 214; UC ¶ 180, none of whom are alleged to have adopted this strategy, there  
 7 is no reason to credit this theory, even at the pleading stage.

### 8 **3. Users’ Purported Injuries Were Not Caused By Lost Competition**

9 Antitrust injury requires that a plaintiff’s injuries “flow[] from that which makes [the  
 10 defendant’s] conduct unlawful.” *Somers*, 729 F.3d at 963. That is, Users must have been injured  
 11 by a reduction in competition in the alleged markets caused by Facebook’s conduct. *Qualcomm*,  
 12 969 F.3d at 999-1000. Users do not plausibly tie their supposed harms to any purportedly  
 13 competition-reducing aspect of Facebook’s conduct.

14 The UC’s allegations about how generic “users” were injured are insufficient because they  
 15 are not tied to any harm to competition. **First**, Users assert that they might have “benefitted from”  
 16 more favorable “data privacy practices.” UC ¶ 226. However, the UC does not explain why  
 17 Facebook’s competitors in fact did not respond to Facebook’s representations about its privacy  
 18 policies with better policies and practices of their own. Indeed, the UC alleges that Facebook’s  
 19 early competitors’ privacy practices were deficient, *id.* ¶ 104 (describing “Myspace’s lax privacy  
 20 practices”), and did not respond to Facebook’s improved policies, rendering it implausible that any  
 21 purportedly excluded firms would have somehow offered better privacy terms than Facebook.  
 22 **Second**, Users claim that they would have benefitted from improved “social media application  
 23 quality.” *Id.* ¶ 226. But there is no plausible factual allegation that would address how firms with  
 24 no plans to enter the relevant markets might have competed on quality or provided a better user  
 25 experience than Facebook or its actual competitors, and the UC contends that even products that  
 26 were “better” would not have succeeded. *Id.* ¶ 87. **Third**, they assert that they “received  
 27 substantially less *compensation* . . . than they would have absent Facebook’s . . . conduct.” *E.g.*,  
 28

1 *id.* ¶ 266. But Facebook is already free and there are no plausible facts alleged to support the  
2 argument that Facebook would have paid Users absent the conduct at issue. *See supra* pp.28-30.

### 3 **B. No Plaintiffs Were Injured By “Copy, Acquire, Kill”**

4 Both Complaints allege that Facebook maintained its supposed monopoly power through  
5 a strategy built around the withdrawal of APIs and data-sharing contracts designed to neutralize  
6 emergent competitors. UC ¶¶ 169-213; AC ¶¶ 216-33, 245-323. But neither Complaint alleges  
7 facts regarding how any of the purportedly affected firms would have competed more effectively  
8 but for the challenged conduct, particularly in light of the allegations that a competitor as well-  
9 resourced as Google was unsuccessful because of market forces, UC ¶¶ 131-35; AC ¶¶ 74-82, and  
10 Plaintiffs’ own insistence that, because of network effects, only one firm was destined to be  
11 successful in the alleged relevant markets, UC ¶ 85; AC ¶ 70; *see Lucas Auto.*, 140 F.3d at 1233.

12 The allegations about the firms Facebook acquired, including Instagram and WhatsApp,  
13 suffer from the same defects. There are no facts alleged to allow the Court to conclude that these  
14 firms had any unique ability to enter any of the alleged markets. *Cf. Reveal Chat I*, 471 F. Supp.  
15 3d at 1002-03. Plaintiffs speculate that, “had it continued to add features, Instagram *could* have  
16 threatened Facebook[]” in the alleged relevant markets. UC ¶ 189 (emphasis added). Likewise,  
17 Plaintiffs do not allege any plans on WhatsApp’s part to expand beyond messaging services. *Id.*  
18 ¶¶ 201-03. Without these types of factual allegations, the Court cannot do more than speculate  
19 that the challenged conduct caused Plaintiffs antitrust injury.

### 20 **C. Advertisers Have Not Alleged An Antitrust Injury**

#### 21 **1. The Alleged Injuries From Advertisers’ Section 2 Claims Are** 22 **Conclusory**

23 Advertisers summarily complain only of “supracompetitive” ad pricing. *E.g.*, AC ¶ 486.  
24 But Advertisers fail to plausibly allege that *they* paid a supracompetitive price for advertising. *See*  
25 *Intel Corp. v. Fortress Inv. Grp. LLC*, --- F. Supp. 3d ----, 2021 WL 51727, at \*14 (N.D. Cal. Jan.  
26 6, 2021) (allegations of “supracompetitive pricing” “require plausibility”). The only price  
27 allegation in the AC contends that Facebook charges far *less* for advertising than “titan” Google.  
28 AC ¶ 438. Meanwhile, Advertisers repeatedly extol the superiority of ads on Facebook and the

benefit they derive from the quality of advertising on Facebook. *E.g., id.* ¶¶ 414, 428-29, 436, 440-41. “Generally you must pay more for higher quality.” *Blue Cross Blue Shield v. Marshfield Clinic*, 65 F.3d 1406, 1412 (7th Cir. 1995). This is not an antitrust violation.

Moreover, plaintiffs like Advertisers claiming to be injured from “supracompetitive” purchase prices are required to, at a minimum, identify the competitive price and provide “information about, *e.g.*, what [they] paid” to adequately plead injury. *Fortress*, 2021 WL 51727, at \*15. The AC contains no such allegations. And even if there were allegations of higher prices, higher prices by themselves are not an adequate allegation of injury. As the Supreme Court recently explained: if “output is expanding at the same time prices are increasing, rising prices are equally consistent with growing demand.” *Am. Express*, 138 S. Ct. at 2288; *see also Safeway Inc. v. Abbott Labs.*, 761 F. Supp. 2d 874, 887 (N.D. Cal. 2011) (“supracompetitive pricing must be accompanied by restricted output”). Since Plaintiffs allege increases in output, UC ¶ 226, the allegation of “supracompetitive” prices does not state a claim.

## 2. Advertisers Lack Antitrust Standing To Pursue Their Section 1 Claim

Advertisers also lack standing to pursue their claim that the GNBA violates Section 1 of the Sherman Act.<sup>15</sup> Similar to their Section 2 claims, Advertisers’ Section 1 claim is premised on a theory that they paid “supracompetitive prices.” AC ¶¶ 22, 486. But as explained above, those allegations are conclusory and lack the specificity required to survive a motion to dismiss.

The GNBA concerns advertising that takes place off Facebook on third-party mobile applications. AC ¶¶ 18, 401. Advertisers allege that they were injured only as purchasers of ads in the social advertising market on Facebook’s platforms, *id.* ¶¶ 22, 412, that the social advertising market is distinct from (and not substitutable with) “programmatic and exchange-based ad markets” consisting of digital advertising on third-party websites and applications, *id.* ¶¶ 18, 412-50, and that the GNBA restrained competition only in the exchange-based ad markets, *id.* ¶¶ 18, 401, 411. Advertisers are thus alleging harm in one alleged market (social advertising) by virtue of an agreement that they say restrained competition in a separate alleged market (programmatic and exchange-based advertising). This theory of harm is plainly inadequate.

<sup>15</sup> Users do not challenge the GNBA.

1       **First**, Advertisers fail to put forth any plausible allegations that the GNBA caused their  
 2 alleged injury. *See Somers*, 729 F.3d at 964 (explaining that to have antitrust standing a plaintiff  
 3 must “suffer[] an injury caused by [] anticompetitive conduct”). The AC does not contain any  
 4 plausible allegations that the GNBA caused Facebook’s ad prices to increase. Instead, Advertisers  
 5 allege in conclusory terms that the GNBA somehow “propped up” the allegedly supracompetitive  
 6 prices that Facebook was already charging for “social advertising.” AC ¶ 406. But while  
 7 Advertisers allege in conclusory terms that the GNBA was an agreement to “divide and segment  
 8 markets,” *id.* ¶ 411, they do nothing to allege facts explaining how, absent the GNBA, Google was  
 9 poised to “poach advertising sales from Facebook” on *Facebook’s own platforms* or anywhere in  
 10 the supposed *social advertising* market. *See id.* ¶ 410. This case is therefore distinct from cases  
 11 in which plaintiffs demonstrated causation via a connection between prices in two allegedly  
 12 separate markets. *Cf. Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000);  
 13 *Amarel*, 102 F.3d at 1508, 1512. Similarly, Advertisers have not plausibly alleged—as they  
 14 must—that they are a “consumer . . . or a competitor of the alleged violator in the restrained  
 15 market.” *Somers*, 729 F.3d at 963. As explained, Advertisers have put forth no plausible, non-  
 16 conclusory allegations that the GNBA restrained competition in the alleged *social advertising*  
 17 market in which they participate. Thus, Advertisers have not adequately alleged they are  
 18 consumers “in the restrained market,” *id.*, and parties “whose injuries . . . are experienced in  
 19 another market do not suffer an antitrust injury,” *Am. Ad*, 190 F.3d at 1057.

20       **Second**, even if Advertisers adequately alleged some plausible theory under which the  
 21 GNBA could impact prices in the alleged social advertising market, their theory of harm is far too  
 22 speculative to support antitrust standing. *See Assoc. Gen. Contractors of Cal., Inc. v. Cal. State*  
 23 *Council of Carpenters*, 459 U.S. 519, 541 (1983). Unable to identify a specific impact the GNBA  
 24 had on the prices Facebook charges for advertising on its own platforms, Advertisers do nothing  
 25 more than assert in broad terms that the GNBA must have had some impact on prices that they  
 26 allege were supracompetitive before the GNBA was executed. *See* AC ¶ 27 (alleging Plaintiff  
 27 Joshua Jeon paid supracompetitive prices for Facebook ads purchased in April 2016); *id.* ¶ 400  
 28 (alleging the GNBA was executed in September 2018). At the same time, however, Advertisers

1 identify in support of their Section 2 claims a laundry list of other issues that purportedly permitted  
 2 Facebook to charge and maintain supracompetitive pricing. *See id.* ¶¶ 44-368. Those  
 3 allegations—themselves insufficient to support any antitrust claim—concerning conduct that had  
 4 nothing to do with, and largely predated, the GNBA underscore the lack of any alleged direct  
 5 connection between the GNBA and the alleged harm. *See Assoc. Gen. Contractors*, 459 U.S. at  
 6 542 (damages speculative when “alleged effects . . . produced by independent factors”).

7 **Third**, even if the Court were to conclude that Advertisers have alleged some form of injury  
 8 in the alleged social advertising market because of Facebook’s alleged conduct in what is alleged  
 9 to be a separate market, Advertisers are not efficient enforcers of claims arising out of the GNBA.  
 10 As the Supreme Court held, “[t]he existence of an identifiable class of persons whose self-  
 11 interest . . . motivate[s] them to vindicate the public interest in antitrust enforcement diminishes  
 12 the justification for allowing a more remote party . . . to perform the office of a private attorney  
 13 general.” *Assoc. Gen. Contractors*, 459 U.S. at 542. Here, Advertisers are, at best, a remote  
 14 plaintiff who allegedly suffered some indirect harm, perpetrated in unspecified ways and allegedly  
 15 arising from the GNBA. While Facebook rejects any notion that the GNBA constitutes an  
 16 anticompetitive agreement, there are nonetheless other potential plaintiffs—specifically,  
 17 advertisers who actually purchased ads on Google’s ad exchanges—whose self-interest would  
 18 motivate them to pursue Section 1 claims arising out of the GNBA. And they are doing exactly  
 19 that. *See supra* n.4. Accordingly, even if the Court were to find Advertisers had sufficiently  
 20 alleged antitrust injury, Advertisers still lack antitrust standing because they are not the most  
 21 efficient enforcers to bring claims arising from the GNBA. *See Lucas v. Bechtel Corp.*, 800 F.2d  
 22 839, 844 (9th Cir. 1986) (no antitrust standing where defendants’ “competitors [were] much more  
 23 immediate victims of the alleged conspiracy, and an action by them would encounter none of the  
 24 conceptual difficulties that encumber the [plaintiffs’] claim”).

25 **Fourth**, Advertisers allege the Agreement was executed in September 2018, but five of the  
 26 named Plaintiffs—Affilious, Jessyca Frederick, Joshua Jeon, 406 Property Services, PLLC, and  
 27 Mark Young d/b/a Dinkum Hair—did not purchase advertising after that date. *See* AC ¶¶ 24, 25,  
 28 27, 28; Decl. of Kristin Armitage ¶ 4. These five Advertisers necessarily cannot claim causal

1 antitrust injury. *See* 15 U.S.C. § 15(a) (plaintiff seeking monetary damages for antitrust violations  
2 must prove that he has been “injured in his business or property.”).

### 3 **V. USERS FAIL TO STATE A CLAIM FOR UNJUST ENRICHMENT**

4 Users’ unjust enrichment claims under California law (*see* UC Fifth Claim for Relief,  
5 ¶¶ 308-17) should be dismissed with prejudice for three independent reasons.

6 ***First***, there is no cause of action for unjust enrichment under California law. *See, e.g.,*  
7 *Herskowitz v. Apple Inc.*, 940 F. Supp. 2d 1131, 1148 (N.D. Cal. 2013) (collecting cases).

8 ***Second***, Users offer no basis other than their defective antitrust allegations for concluding  
9 that any alleged enrichment of Facebook was unjust. Where a plaintiff’s claim of unjust  
10 enrichment “does not allege any distinct purported impropriety, but depends entirely on the  
11 allegation that the defendants benefitted from actions that are unlawful under other theories of  
12 liability in their complaint,” the unjust enrichment claim must be dismissed when those other  
13 claims are dismissed. *In re Late Fee Litig.*, 528 F. Supp. 2d 953, 967 (N.D. Cal. 2007).

14 ***Third***, Users’ unjust enrichment claims should be dismissed because there is a contractual  
15 relationship between each User and Facebook. *See, e.g.,* UC ¶ 5 (“When users sign up for a  
16 Facebook account, they agree to certain terms.”). Certain federal courts in California have  
17 construed unjust enrichment claims under California law as quasi-contract claims seeking  
18 restitution. *See, e.g., Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015). But  
19 it is “well settled that an action based on an implied-in-fact or quasi-contract cannot lie where there  
20 exists between the parties a valid express contract covering the same subject matter.” *O’Connor*  
21 *v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 999-1000 (N.D. Cal. 2014). Here, the terms govern  
22 Users’ use of Facebook’s services and dismissal is appropriate. *See Letizia v. Facebook, Inc.*, 267  
23 F. Supp. 3d 1235, 1253-54 (N.D. Cal. 2017).

### 24 **CONCLUSION**

25 For the reasons discussed, Plaintiffs’ claims are untimely and untenable. This Court should  
26 grant Facebook’s motion to dismiss with prejudice.

1 Dated: May 20, 2021

Respectfully submitted,

2  
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**CERTIFICATE OF SERVICE**

I hereby certify that on this 20th day of May, 2021, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System.

/s/ Sonal N. Mehta

Sonal N. Mehta